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Nos. 90-1262 and 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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AMICUS BRIEF OF THE COLORADO WATER CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Counsel for the parties to this litigation have consented to the filing of this amicus brief by the Colorado Water Congress ("CWC"). Letters from counsel for the parties are on file with the Clerk of this Court. The CWC submits this brief in support of the Petitioners.

The Colorado Water Congress is a statewide organization composed of cities, counties, water user associations, agricultural ditch and reservoir companies, water conservancy and water conservation districts, businesses, law firms, engineering firms, individuals, and Colorado State agencies interested in water matters affecting the State of Colorado and those who hold or seek to hold water rights under Colorado law.

Representative members include the cities of Aurora, Boulder, Colorado Springs, Denver, Durango, Fort Collins, Grand Junction, Pueblo, and the counties of Adams, Conejos, Delta, Eagle, Jackson, Jefferson, La Plata, Mesa, Moffat, Pitkin, Routt, Summit, and Weld. Representative water districts include the Colorado River Water Conservations District, the Northern Colorado Water Conservancy District, the Rio Grande Water Conservation District, the Southeastern Water Conservancy District, and the Southwestern Water Conservation District. Such cities, counties and districts provide water to the population of Colorado, approximately two and three quarter million people, and in combination with agricultural ditch and reservoir companies, ensure those water supplies necessary for Colorado's economy, including its irrigated farms, its businesses, and the recreational industry. Representative business members of CWC include Adolph Coors Company, CF&I Steel Corporation, Colorado Farm Bureau, Colorado Cattlemen's Association, Colorado Ski Country U.S.A., Colorado Association of Commerce and Industry, and the Rocky Mountain Oil and Gas Association.

Members of CWC hold pollutant discharge elimination permits from the State of Colorado under a permit program approved by the United States Environmental Protection Agency in accordance with the federal Clean Water Act. See C.R.S. 25-8-501 et seq. In addition, members of CWC hold water rights for beneficial use under the provisions of Colorado water law, allocated and administered according to the doctrine of prior appropriation as described in Colorado Constitution Article XVI, Sections 5 and 6; Colorado statutes, primarily the 1969 Water Rights Administration and Adjudication Act, C.R.S. 37-92-101 et seq.; and cases of the Colorado Supreme Court such as *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882) and *Colorado River Water Conservation District v. Colorado Water Conservation Board*, 197 Colo. 469, 594 P.2d 570 (1979), which upholds Colo-

rado's instream flow program as within the doctrine of prior appropriation.

As with the other Western States carved out of the public domain by settlement policies fostered by the federal government, see *U.S. v. New Mexico*, 438 U.S. 696 (1978), Colorado's strength and well-being is directly dependent on its ability to store the Spring snowmelt high up in the watershed, to divert directly from the streams when the water is running high, and to release from storage, particularly after mid-July when natural flow declines to extremely low levels. The ability to meet the year-round water demand of cities, businesses and farms is inextricably tied to water released from reservoirs. In addition, the Front Range of Colorado, east of the Continental Divide, receives annual precipitation of from 12 to 15 inches and is dependent on supplemental transmountain diversions from Colorado's Western Slope. *See United States v. Northern Colorado Water Conservancy District*, 608 F.2d 422 (10th Cir. 1979). Colorado's hydrologic cycle and the key role of water storage and development to States like it and Wyoming were addressed by this Court in *Wyoming v. Colorado*, 259 U.S. 419, 457-458 (1922).

As the quintessential upstream State, comprising the headwaters of the Platte, Arkansas, Colorado, and Rio Grande Rivers, Colorado participated in nine interstate compacts and several equitable apportionment cases allocating among sister States waters arising within and flowing from the state.[1] See e.g., *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Nebraska v. Wyoming*, 352

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[1] In fact, in certain instances the states have jointly addressed water quality concerns as evidenced by Article IX of the 1965 Arkansas River Basin Compact between Kansas and Oklahoma:

> The states of Kansas and Oklahoma mutually agree to:
>
> A. The principle of individual state effort to abate man-made pollution within each state's respective borders, and the continuing support of both states in an active pollution-abatement program;

U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922). Eighteen states are direct recipients of water originating in Colorado, as are a number of Indian tribes. See section 518(e), 33 U.S.C. § 1377(e). Consequently, Colorado has closely scrutinized policies, decisions and regulatory developments which could adversely affect development of its legal share of the water resource.

Colorado is also the home of the McCarran Amendment cases which interpret and apply the provisions of 43 U.S.C. § 666 governing the joinder of the United States' water rights claims in State forums. *See United States v. District Court for Eagle County*, 401 U.S. 520 (1971), *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982), and *United States v. Bell*, 724 P.2d 631 (1986). Such cases involved the creation, scope, administration and priority of rights to water claimed to arise by the establishment of federal land reservations. CWC and its members were actively involved in each of those cases.

Wit' advent of major federal environmental Acts, such as lean Water Act, CWC and its members have become asingly concerned that the misapplication of federal water quality laws could undermine the water allocation law of the States. Section 101(g) of the

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B. The cooperation of the appropriate state agencies in Kansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas river basin whenever such matters are called to their attention by the commission;

C. Enter into joint programs for the identification and control of sources of natural pollution within the Arkansas river basin which the commission finds are of interstate significance;

D. The principle that neither state may require the other to provide water for the purpose of water-quality control as a substitute for adequate waste treatment;

E. Utilize the provisions of the federal water pollution control act in the resolution of any pollution problems which cannot be resolved within the provisions of this compact.

Clean Water Act, 33 U.S.C. § 1251(g), provides that the authority of each State to allocate quantities of water shall not be superseded, abrogated or otherwise impaired by programs under the Clean Water Act, nor shall the Act supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies are directed to cooperate with State and local agencies "to prevent, reduce and eliminate pollution in concert with programs for managing water resources." Thus, the Clean Water Act is an exercise in fundamental federalism designed to achieve a national program of water quality control implemented on a State by State basis to protect beneficial uses, thereby supporting and not undermining the allocation, administration, and development of each State's allocated water resource. *See*, generally, Hobbs and Raley, "Water Rights Protection in Water Quality Law," 60 *Univ. Colo. L. Rev.* 841, 872 (1989).

The State of Colorado, CWC, and its members have participated in a number of cases seeking careful application of the policies of the Clean Water Act, including the policy of controlling the discharge of pollutants and the policy of respecting State water allocation and administration systems and water rights created under them. Such cases include the Colorado River Basin salinity control case, *Environmental Defense Fund v. Costle*, 657 F.2d 275 (D.C. Cir. 1981); the section 404 nationwide permit dam construction case, *Riverside v. Andrews*, 758 F.2d 508 (10th Cir. 1981); the reservoir release discharge of pollutants case, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); the section 208 water quality planning case, *Northern Colorado Water Conservancy District v. Board of County Commissioners*, 482 F. Supp. 1115 (D. Colo. 1980); the "waters of the United States" point source discharge permit case, *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979); and the clear water reservoir release case, *A-B Cattle Co. v. United States*, 196 Colo.

539, 589 P.2d 57 (Colo. 1978). Each of these cases is important to this Court's consideration of the Federal/State balance struck by Congress in the law and policies applicable to the interface between federal water quality law and State adjudicated water rights.

Finally, the past investment of CWC members in water development projects, such as dams and reservoirs, and in wastewater treatment facilities, will be put at risk as continued operation thereof may be placed in jeopardy. Necessary future projects will be hampered by the uncertainty arising from the need to meet all downstream water quality standards which are constantly subject to change, and which, according to the lower Court, include a prohibition against discharge where current downstream violations exist. Long range financial planning and bonding may become impossible, and the State's economic well-being will be placed in doubt.

The decision of the Tenth Circuit bestows upon an individual downstream State veto authority over water use and development in upstream States, is counter to the provisions and policy of the Clean Water Act governing interstate pollution matters, and encourages States to improve upon their allocated water resource by adopting state line water quality and land use designations which will lock out further upstream water use and discharges even though they meet the goal and letter of the Clean Water Act's State-by-State classified use and water quality standards program.

SUMMARY OF ARGUMENT

The Tenth Circuit decision effectively provides downstream states with virtual veto authority over discharge activities located in an upstream state. In addition, it establishes an absolute prohibition against any additional point source discharges to those waters where violations already exist if such discharges will contribute to the condition that produced the violation. These additional

contributions need not even be detectable. This ruling, which is conflict with the prior holdings of this Court in *International Paper Company v. Ouellette*, 479 U.S. 481 (1987), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), could foreclose future upstream development in a headwater state such as Colorado while, at the very least, leading to destructive disputes between the states over the presence of downstream impacts, the propriety of downstream standards and policies, and the appropriate allocation of water resources.[2]

The Circuit Court decision is inconsistent with the statutory scheme embodied in the various pertinent provisions of the Clean Water Act. Congress made a conscious distinction in Sections 301, 302 and 303 of the Act between "federal" standards and effluent limitations, and those adopted by the states. There is no indication that state standards were to have direct extraterritorial application. However, pursuant to Section 401 of the Act, where a federal license or permit was necessary, affected states could put their objections of record. Similarly, pursuant to Section 402(b)(5), such states could "make "recommendations" to the permitting state relative to applications pending in the permitting state. An accommodation process, with EPA oversight, was the key to insuring interstate equity while preserving state sovereignty. The Tenth Circuit opinion totally undermines this result.

The Circuit Court opinion will have similarly disastrous results if it is applied, as it must be, to certain new elements of state water quality standard programs, such as water quality standards for wetlands, biocriteria, and Section 319 nonpoint source controls. Each of these programs, which EPA is demanding be incorporated into the state water quality standards regulatory process, will control hydrologic modifications in order to ostensibly protect the

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[2] The CWC will not independently discuss the governing case law, but will rather adopt by reference the arguments made by Petitioner, State of Arkansas, and *amicus*, State of Colorado.

"biological" integrity of downstream aquatic resources. This could seriously disrupt water supply operations in arid or semi-arid upstream states such as Colorado, where existing flows are diverted, used and reused, pursuant to the prior appropriation doctrine, in order to meet agricultural, municipal and industrial needs.

ARGUMENT

I. THE TENTH CIRCUIT MISCONSTRUED THE RELEVANT PROVISIONS OF THE FEDERAL ACT

In rendering its decision, the Tenth Circuit cited various provisions of the Clean Water Act, indicating that one must "look to the CWA as a whole" in determining whether a discharge permit must insure compliance with the applicable water quality standards of all affected states. *State of Oklahoma v. E.P.A.*, 908 F.2d 595, 606 (10th Cir. 1990). However, just such a review inexorably leads to the conclusion that the Tenth Circuit decision must be overturned.

A. The Tenth Circuit Misinterpreted Section 301(b)(1)(C)

Once water quality standards are established by a state pursuant to Section 303 of the federal Act, effluent limitations are applied to point source dischargers for purposes of ensuring that such standards are met. Pursuant to Section 301(b)(1)(A) and (B), 33 U.S.C. § 1311(A) (B), technology-based effluent limitations are to be achieved by a date certain, including secondary treatment for publicly-owned treatment works. Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), then further directs the achievement of

> . . . any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, *established pursuant to any state law* or regulations (*under au-*

> *thority preserved by § 510* of this title) or any other Federal law or regulation, *or required to implement any applicable water quality standard established pursuant to this chapter.* (emphasis added)

The Tenth Circuit concluded that this provision would "require dischargers to meet the applicable requirements of other affected states". *Oklahoma*, 908 F.2d at 606. However, this determination by the Court is rebutted by the clear language of the statute.

Section 301(b)(1)(C), on its face, simply states that limitations must be imposed which are "necessary to meet water quality standards . . . established pursuant to any state law or regulations (under authority preserved by § 510 of this title . . . ." Section 510, 33 U.S.C. § 1370, in turn, provides in part:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any state or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is *in effect under this chapter*, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent . . . . (emphasis added)

Hence, the state standards to which reference are made in Section 301(b)(1)(C) are something *other than* standards "in effect under this chapter." That is to say, they are not the "federal law" to which the Tenth Circuit made reference in justifying its decision. *Oklahoma*, 908 F.2d at 607.

The distinction found in Section 510 between state-adopted standards and federal criteria is then further highlighted in Section 301(b)(1)(C) as quoted above,

wherein reference is made to limitations "established pursuant to any state law . . . *or* required to implement any applicable water quality standards established pursuant to this chapter." (emphasis added) This phrase indicates Congressional intent that there be a demarcation between standards established under state law, which standards need EPA approval (§ 303(c)), and standards established pursuant to the Act. If, as the Tenth Circuit concludes, EPA-approved state standards are "federal law," such state standards would indeed be "established pursuant to this chapter," and the distinction rendered meaningless. However, each word of a statute must be given meaning and interpreted according to its plain terms. *Garcia v. U.S.*, 469 U.S. 70 (1984); *Bushkin Assoc., Inc. v. Raytheon Company*, 906 F.2d 11, 14 (1st Cir. 1990). Hence, though Section 301(b)(1)(C) does not directly address the ability of one state to impose its water quality standards upon another state, the only fair reading of the statutory scheme runs counter to the lower Court's conclusion.

B. Section 302 Of The Act Militates Against The Tenth Circuit Conclusion

Aware of the fact that the effluent limitations established pursuant to Section 301 would not necessarily result in the attainment of the desired water quality, Congress provided, in Section 302 of the Act, 33 U.S.C. § 1312, for the establishment of "water quality related effluent limitations" for specific categories of pollutants. These limitations were to be more stringent requirements based not upon available technology, but rather upon the quality of the water in the stream. The Tenth Circuit took great comfort in the fact that Section 302 references "water quality in a specific portion of the navigable waters," and not "intrastate water quality effects." *Oklahoma*, 908 F.2d at 615.

> Indeed the statute's use of the term "specific portion of the navigable waters" . . . rather than specifying

> waters of the source or permitting state, suggests that the section contemplates regulation of water quality without regard to state boundaries. Vesting authority in EPA, instead of in individual states, arguably suggests a similar intent.

Oklahoma, 908 F.2d at 615.

Section 302 of the Act, not unlike Section 301, does not directly address the issue of interstate application of mandated water quality controls. However, the 1987 amendments to Section 302, amendments which were not cited by the lower Court, specifically provide for modification by the Administrator of effluent limitations established thereunder "with the concurrence of the State." § 302(b)(2), 33 U.S.C. § 1312(b)(2). Thus, not only was the Tenth Circuit's insistence upon strict compliance statutorily waived, but concurrence of "the State" and *not* "all affected States," was to be sought.

Finally, the Circuit Court conclusion that "vesting of authority in EPA, instead of in individual states," supports the concept of interstate application of state-adopted water quality standards is simply contrary to the Court's express justification for requiring compliance with the water quality standards of affected states, i.e., that EPA-approved state standards constitute federal law. Under this scenario, state adoption of water quality standards places the individual states in the position of EPA, and the distinction between state and federal authority once again becomes moot. There would simply be no need to vest authority in the federal agency. Thus, though there may be merit in the Court's observation that the vesting of authority in a "federal" agency (EPA) indicates a desire to effectuate regulations with interstate application, its determination that this suggests approval of "state" veto power over out of state permits does not logically follow.

C. Section 303 Of The Act Indicates That States Have Jurisdiction Only Over Activities Within Their Boundaries

Congress, cognizant of the fact that technology-based limitations would not, in every instance, be adequate to meet water quality standards, adopted the concept of total maximum daily loads (TMDL's) in Section 303(d) of the Act, 33 U.S.C. § 1313(d).

> (1)(A) Each state shall identify those waters *within its boundaries* for which the effluent limitations required by Section 301(b)(1)(A) and Section 301(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall *establish a priority ranking* of such waters, taking into account the severity of the pollution and the uses to be made of such waters . . .
>
> (C) Each state shall establish for the *waters identified in paragraph (1)(A)* of this subsection, and in accordance with the priority ranking, the total maxmium daily load [TMDL], for those pollutants which the Administrator identifies under Section 304(a)(2) of this title, as suitable for such calculation. *Such load shall be established at a level necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. (emphasis added)

Therefore, each state was to calculate TMDL's for waters "within its boundaries" in order to meet water quality standards. Had Congress desired to establish "interstate" wasteload allocations, it could have so provided by statute. It did not do so. It is not now for the judiciary to fashion such a program.[3] *See, Chevron, U.S.A., Inc. v.*

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[3] Congress did identify, in Section 208(a) of the Act, 33 U.S.C. § 1288(a), a process for dealing with areas which have "substantial water quality control problems" and are loctaed in two or more

Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

Further, contrary to the Circuit Court decision, Section 303(d) does not mandate either immediate compliance with existing violations of water quality standards, or a prohibition against new discharges to the offending stream segment. Rather, it allows states the flexibility to establish a "priority ranking" in remediating the problems, and to permit new discharges so long as they are incorporated into the TMDL process.

The provisions of Section 303 are also of vital significance in analyzing the propriety of the Tenth Circuit decision for one additional reason. It is pursuant to this section that states promulgate the water quality standards which are the cornerstone for the regulatory process in question. Notice of a rulemaking for purposes of adopting such standards on an individual state level is provided in accordance with the mandates of state law, and disseminated on a state-wide basis. Colorado, for example, utilizes a Water Quality Information Bulletin for those on the mailing list, and publishes notice in the official state register. A hearing is then held before the appropriate state agency, standards are adopted by the state agency, and the standards are then submitted to EPA for approval pursuant to Section 303(c) of the Act, 33 U.S.C. § 1313(c). So long as the standards are more stringent than federal requirements, EPA has no choice but to approve the standards. *Homestake Min. Co. v. E.P.A.*, 477 F. Supp. 1279, 1284 (D. S.D. 1979). Notice of the action taken by EPA may then appear in the Federal Register. *See*, 40 C.F.R. § 131.21(d).

It is clear from the above procedural outline that if the Tenth Circuit decision is a correct analysis of the

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states. This provision calls for joint consultation and cooperation in the development of area-wide waste treatment management plans. This is a far cry from the veto authority provided to one state under the Tenth Circuit opinion.

federal Act, those critically affected by the standard setting process are not a party to the rule-making proceedings, and in fact receive no notice thereof. However, as stated by this Court in *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978), the Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. *See also, Florida Gas Transm. Co. v. F.E.R.C.*, 876 F.2d 42 (5th Cir. 1989). Under Colorado law, a water right is a vested property right. *Public Service Co. of Colorado v. F.E.R.C.* 754 F.2d 1555 (10th Cir. 1985); *Wiebert v. Rothe Bros., Inc.*, 200 Colo. 310, 618 P.2d 1367 (1980); *see also, Hinderlider v. Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102, (1938). Given the dramatic effect, under the lower Court decision, which the promulgation of water quality standards by lower basin states could have upon the exercise of upstream water rights, all upper basin states would be entitled to APA notice. *See*, 5 U.S.C. § 553. However, such notice is not current provided, disclosing but one more reason why the Tenth Circuit decision is in error.

D. The Language Of Section 401 Of The Act Does Not Support The Tenth Circuit Conclusions

Section 401 of the federal Act, 33 U.S.C. § 1341, established a process whereby a state has the opportunity to certify that "any applicant for a federal license or permit to conduct any activity" will meet the applicable water quality requirements of the Act as adopted by the state. Though this section does provide a mechanism for considering the views of affected downstream states, the Circuit Court's analysis of the significance of this language is overly simplistic. Section 401(a)(2), 33 U.S.C. § 1341(a)(2), states in part:

> Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other state, the Administrator . . . shall so

> notify such other state, the licensing or permitting agency, and the applicant. If . . . such other state determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such state, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. *The Administrator shall at such hearing submit his evaluation and recommendations* with respect to any such objection to the licensing or permitting agency. *Such agency, based upon the recommendations of such state, the Administrator, and upon any additional evidence,* if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance, such agency shall not issue such license or permit. (emphasis added)

Therefore, pursuant to Section 401, it is the Administrator, not the potentially impacted state, who determines if the discharge may affect the quality of waters of that state. Should the Administrator make such a determination of possible impact, there is no requirement of automatic and unequivocal compliance with the water quality requirements of the affected state, but rather the Administrator submits an "evaluation and recommendation" to the permitting agency. The permitting agency then considers the recommendation, along with other tendered evidence, in determining what conditions he believes appropriate to insure conformance with applicable water quality requirements. Rather than automatic compliance, there is a weighing and balancing of the evidence heard.[4]

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[4] It must not be forgotten that EPA also considers a state's antidegradation policy to be a part of its water quality standards program. 40 C.F.R. 131.12. Under the federal policy, no degradation is permitted of the highest quality waters even though existing

Further, Section 401 is addressed solely to situations where there exists issuance of "federal licenses or permits." Many discharge permits, whether issued in the first instance or upon renewal by delegated state agencies, would not require such certification. Congress evidently saw fit to single out federally approved projects discharging to interstate waters for closer scrutiny. However, this certainly does not indicate a Congressional desire to promote confrontation between the states in the implementation of their general permitting programs. In fact, though the federal regulation governing Section 401 certification (40 C.F.R. § 121.2(a)(3)) requires a statement "that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards," the term "water quality standards" is defined in the regulations as follows:

> (g) "Water quality standards" means standards established pursuant to § 10(c) of the Act, *and state-adopted water quality standards* for navigable waters which are *not interstate waters.* (emphasis added)

40 C.F.R. § 121.1(g). Thus, Section 401 certification review by the very terms of the pertinent federal regulations, is limited to a determination that there will be no exceedence of "federal" standards adopted by EPA under

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uses would be fully protected. 40 C.F.R. § 131.12(a)(3). Limited degradation is permitted in certain other waters "if allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." 40 C.F.R. § 131.12(a)(2). The policy applies to point and nonpoint sources alike. EPA, Questions and Answers on Antidegradation, August 1985. *If* the Circuit Court decision is correct, downstream states would not only be prohibiting upstream development where the highest quality waters lay below such activities, but would be making determinations about the economic and social utility of projects in other states for remaining waters, even though the development would probably *not* be occurring in the downstream state. This would give rise to untold inequities and jurisdictional disputes.

the Act, or state promulgated standards for wholly *intrastate* waters. The certification would not even include review of state adopted standards for interstate waters, the type of waters at issue in the Tenth Circuit opinion.

E. The Permitting Provisions Of Section 402 Only Allow For Recommendations By The Affected State

Section 402 of the Act, 33 U.S.C. § 1342, establishes the discharge permit system. Specifically, Section 402(d)(2), 33 U.S.C. § 1342(d)(2), as cited by the Tenth Circuit, provides in part:

> (2) No permit shall issue (A) if the Administrator within ninety days of the date of his *notification under Subsection (b)(5)* of this section objects in writing to the issuance of such permit or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the state, objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter . . . (emphasis added)

Subsection (b)(5), as cross-referenced, states:

> The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:
>
> * * * *
>
> (5) To insure than any State (other than the permitting State) whose waters may be affected by the issuance of a permit *may submit written recommendations* to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing; (emphasis added)[5]

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[5] The Circuit Court's conclusion that § 402(b)(5) "derives from § 401," *Oklahoma* 908 F.2d at 612, is totally unsubstantiated by anything in the Act or its legislative history.

Hence, though affected downstream states can make "recommendations" to the permitting state and the Administrator, this does not support, and indeed is contrary to, any conclusion that there must be absolute compliance with the water quality standards of the downstream state.

In addition, though it is true that Section 402(b)(1)(A) of the Act, 33 U.S.C. § 1342(b)(1)(A), generally requires compliance with water quality standards and effluent limitations, the Tenth Circuit's reliance upon this provision ignores the accepted principle of statutory construction whereby the specific provision controls over the general *HCSC-Laundry v. United States*, 450 U.S. 1, 5 (1981). In this case, the specific provisions addressing interstate disputes mandate the previously-referenced balancing process.

Finally, it is curious that the lower Court, in its discussion of Section 402, completely failed to note what is a key provision in the resolution of this controversy. Section 402(b), 33 U.S.C. § 1342(b), entitled "State permit programs," bestows permitting authority upon the states in the following words:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of Section 304 of this title, the governor of each state desiring to administer its own permit program for discharges into navigable waters *within its jurisdiction* may submit to the Administrator a full and complete description of the program it proposes to establish and administer *under State law or under an interstate compact.* (emphasis added)

Waters located outside the state, such as the waters of the Illinois River within Arkansas, are *not "within* [the] jurisdiction" of Oklahoma, and thus not subject to its discharge permit program. *See, United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). Any extraterritorial permitting authority would depend upon

the execution of a compact agreement. *See also, Hinderlider v. La Plata & Cherry Ditch Co.*, 304 U.S. 92 (1938).

F. Section 505 Of The Act Indicates An Intent To Enforce Only In-State Requirements

The Tenth Circuit's reliance upon Section 505(h), 33 U.S.C. § 1365(h), is similarly misplaced. Under this provision,

> A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter *the violation of which is occurring in another State* and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State. (emphasis added)

Section 505(h) specifically establishes two conditions which must be met before its provisions can be invoked by the Governor of an affected state. First, there must be a failure to enforce a standard or effluent limitation, the violation of which is occurring *in another state.* Second, that violation must be causing an adverse effect on the public health or welfare in the affected state, or a violation of a water qualtiy requirement in the affected state. The initial triggering condition is, therefore, a violation occurring in the *state of discharge*, which violation remains unpunished. The facts before the Tenth Circuit involved a potential violation in the downstream (affected) state without a concomitant violation in the upstream state. Hence, Section 505(h) was of limited utility in rendering a decision in the Oklahoma/Arkansas dispute. However, Section 505(h) does run contrary to the general conclusions reached by the Circuit Court, as Congress simply could have given the Governors of affected downstream states the power to sue for a violation of

the downstream state's standards by out-of-state dischargers if that was indeed its intent.

G. Section 101(g) And The Governing Case Law Supports EPA Authority Under The Act

A paradigm case upon interstate water quality dispute is *Environmental Defense Fund Inc. v. Costle*, 657 F.2d 275 (D.C. 1981) where it was argued unsuccessfully by EDF that EPA had failed under the Clean Water Act to require the adoption of State line salinity control water quality standards in each of the seven States of the Colorado River Basin: Colorado, Wyoming, Utah, New Mexico, Arizona, Nevada, and California. *See EDF*, 657 F.2d at 287-288. The seven basin state Salinity Control Forum was organized to address salinity control measures, including restrictions in point source discharge permits written by each State and subject to veto by EPA and nonpoint source on-farm salinity control projects, in order to reduce salinity loading between and among the States which could adversely affect classified water uses in each of the States. *EDF*, 657 F.2d at 282, 297-298. The primary motivation for the interstate salinity control cooperative approach approved in this case was to allow, and provide for, the continued development of each of the States' share of Colorado River Compact water, free from the threat of an individual State attaching restrictive salinity water quality standards enforceable on an upstream state. Otherwise, the "Law of the River" applicable to water allocations would surely have given way to State-by-State preemption of the compact allocations in the guise of honoring a downstream State's water quality and land use designations. The *EDF v. Costle* Court determined that the EPA Administrator had ample cause and authority to address the complex matter of interstate water pollution through a combination of the Agency's regulatory authority and working with State authorities within the framework of the water quality standards program, 33 U.S.C. § 1313.

Similarly, in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1182), the Court observed that section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), evidenced Congressional intent not to "interfere any more than necessary with state water management" and to minimize federal control over state decisions on water quantity." The Court recognized that reservoirs are key to making use of water in a State, and that EPA was correct in not categorizing releases from dams as a point source of pollution. *NWF*, 693 F.2d at 178, 179.

Admittedly, the facts before the Tenth Circuit in the Oklahoma/Arkansas case involve a point source of pollution. However, every act of withdrawing and using a quantity of water under State water law involves some diminution or change in the quality of that water as a result of being used. Return flows to a water short river system from prior uses are a key component of the water resource available to fill the appropriations of downstream water users. *See, Comstock v. Ramsay*, 55 Colo. 244, 248, 133 P. 1107, 1108 (1913). The return flow which percolates back into the soil, or is conveyed back to the stream by a point source, is used and reused by downstream water users. The Colorado water courts are in the daily business of defining historic consumptive use and adjudicating junior water rights and changes of water rights, including plans of augmentation and exchange, for use of the return flows. *See*, e.g., *Weibert v. Rothe Brothers, Inc.*, 200 Colo. 310, 316-17, 618 P.2d 1367, 1371-72 (1980). A water quality policy which prevents additional water uses upstream undermines the upstream State's ability to put its allocated water resource to beneficial purposes under State law. In fact, an overly restrictive water quality policy discouraging return flows from point sources encourages evaporative, consumptive treatment techniques which diminish the quantity of water available back to the stream for downstream uses, adversely affecting instream flows. See *Pulaski Irrigation Ditch Co. v. Trinidad*, 70 Colo. 565, 569, 203 P. 681, 683 (1922).

Zero discharge was a goal tempered by practicality. *NWF*, 693 F.2d at 181. This Court should read section 101(g) as precluding interpretation of the Clean Water Act in a manner which would allow a downstream State to unilaterally enforce its water quality standards and land use designations on upstream States.

II. THE TENTH CIRCUIT DECISION WILL UNDERMINE APPLICATION OF RECENT EPA POLICIES AND REGULATIONS

In holding that activities in upstream states must comply absolutely with the water quality standards of all downstream states, the Tenth Circuit not only misinterpreted the pertinent provisions of the Clean Water Act, but also failed to analyze the far-reaching impacts of its holding upon the implementation of recent EPA policies and regulations.

A. The Circuit Court Decision Will Disrupt Water Allocation In Promoting Wetland Protection

In its July, 1990, National Guidance for Water Quality Standards for Wetlands, EPA stated:

> In addition to other narrative criteria, narrative biological criteria provide a further basis for managing a broad range of activities that impact the biological integrity of wetlands and other surface waters, particularly physical and hydrologic modifications. *For instance, hydrologic criteria are one particularly important but often overlooked component to include in water quality standards to help maintain wetlands quality.* Hydrology is a primary factor influencing the type and location of wetlands. . . . *States should consider the establishment of criteria to regulate hydrologic alterations to wetlands.* (emphasis added)

Thus, assuming the legal propriety of this provision, if a downstream state were to adopt hydrologic criteria as part of its water quality standards program, and if that

criteria were applicable to upstream states, the downstream state would in effect be controlling the very flow of the river in enforcing its standards. This would be the case despite the fact that there existed no discharge of pollutants to the waterway. The potential effect of such a provision upon appropriators within an upstream state such as Colorado, as well as upon interstate compact apportionments, is apparent. New upstream appropriations, which inevitably reduce flows, could be prohibited, while full development by the upstream state of its compact entitlements could be foreclosed.

B. The Circuit Court Opinion Will Lead To A Disruptive Application Of Biocriteria Requirements

In April, 1990, EPA published a document entitled: "Biological Criteria, National Program Guidance for Surface Waters." In this publication, EPA indicated that "to meet the objectives of the Act and to comply with statutory requirements under §§ 303 and 304, states are to adopt biological criteria in state standards." *Id.* at 3. As defined by EPA:

> Narrative biological criteria are definable statements of condition or attainable goals for a given use designation. They establish a positive statement about aquatic community characteristics expected to occur within a water body (e.g., "aquatic life shall be as it naturally occurs" or "a natural variety of aquatic life shall be present and all functional groups well represented").

Id. at viii.[6] EPA then continues:

> To develop values for biological criteria, states should (1) identify unimpaired reference water bodies to establish the reference condition and (2) characterize

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[6] EPA has further indicated that "supporting statements for the criteria should promote water quality to protect the *most natural community possible* for the designated use." (emphasis added) *Id.* at 15.

> the aquatic communities inhabiting reference surface waters. Currently, two principal approaches are used to establish reference sites: (1) The site-specific approach, which may require upstream-downstream or near field-far field evaluations, and (2) the regional approach, which identifies similarities in the psysico-chemical characteristics of watersheds that influence aquatic ecology.

Id. at viii. If an impairment of use is found, the causes, be they "chemical, physical, [or] biological stress" are diagnosed, including habitat degradation, and plans are developed to address the problem. "Violation of biological criteria is sufficient cause for states to initiate regulatory action." *Id.* at 14.

Once again, if biocriteria is incorporated into the water quality standards program of the downstream state, and if it is strictly enforceable against the upstream state, absolute protection of the biological integrity of downstream river segments may demand that there be no further modification in the flow regime. Existing flows may be necessary to meet fish or plant needs, or to dilute other sources of pollution. In fact, the necessary control program designed to attain reference reach conditions could require changes in existing upstream practices. Not only would the downstream state be potentially interfering with upstream water diversion activities in contravention of Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), but it may be imposing land use controls for purposes of attenuating nonpoint source pollution. This would inevitably lead to a bitter confrontation not currently contemplated under the Act.

C. The Circuit Court Opinion Is Inconsistent With A Reasoned Application Of Section 319

Finally, it must be acknowledged that a large portion of the remaining surface water pollution in the United States is a result of nonpoint sources. *See, Oregon Nat-*

ural Resources Council v. Lyng, 882 F.2d 1417, 1424 (9th Cir. 1989). In 1987, Congress amended the Act to provide that:

> It is the national policy that programs for the control of nonprofit sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

Section 101(a), 33 U.S.C. § 1251(a). Included within the various categories of nonpoint sources as identified by EPA are hydrologic/habitat modifications, agricultural practices, and urban runoff. *See*, Environmental Protection Agency, Nonpoint Source Guidance (December, 1987). Pursuant to Section 319 of the 1987 Amendments, 33 U.S.C. § 1329, the Governor of each state is to prepare a report identifying waters which "without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirments of this chapter." Section 319(a)(1)(A), 33 U.S.C. § 1329 (a)(1)(A). The Governor "for that state or in combination with adjacent states" is then to prepare a management program for controlling pollution "added by nonpoint sources to the navigable waters *within the state*," such program to include "an identification of programs (including, as appropriate, nonregulatory *or regulatory* programs for enforcement . . .) to achieve implementation of the best management practices [BMP's] by . . . particular nonpoint sources . . . ." (emphasis added) Section 319(b), 33 U.S.C. § 1329(b).[7] The program will employ BMP's in an effort to attain and maintain water quality standards.

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[7] It is also interesting to note that pursuant to Section 319(b)(3), 33 U.S.C. § 1329(b)(4), states are to ". . . develop and implement a management program under this subsection on a watershed-by-watershed basis *within such state*." (emphasis added)

The Section 319 program is currently voluntarily in nature and driven by the prospect of federal grant funding.[8] However, if a downstream state were to promulgate a "regulatory program" to meet its water quality standards, pursuant to the Tenth Circuit opinion, the downstream state could arguably require that activities located in upstream states, such as agricultural endeavors and water diversion projects, subject themselves to the BMP's developed by the downstream state. Once again, this could lead to a chaotic situation whereby one state is attempting to regulate development activities in the upstream states.

Finally, it should be emphasized that the language of Section 319, as quoted above, specifically references the control of pollution added to the navigable waters "within the state," as well as the development of management programs on a "watershed-by-watershed basis within such state." Section 319 (b)(1) and (b)(4), 33 U.S.C. § 1329(b)(1) and (b)(4). Such Congressional pronouncements militate against *interstate* application of state non-point source controls. Yet if such is the case, assuming the Tenth Circuit holding is correct, Congress apparently chose to treat the major remaining contributors of pollutants, i.e., nonprofit sources, in a different fashion than point sources, creating the alleged "gaping loophole" of which the Circuit Court was so fearful. *Oklahoma*, 908 F.2d at 632. This analysis simply discloses the erroneous nature of the Tenth Circuit conclusion. No state was to have veto authority over either point *or* nonpoint source activities occurring in another state.

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[8] In 1990, Congress amended the Coastal Zone Management Act so as to require certain nonpoint source controls. 16 U.S.C. § 1455b. Similar attempts at adopting a uniform mandatory program under the CWA can be expected as part of the current CWA reauthorization process.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Tenth Circuit and find (1) that facilities need not comply with the water quality standards of all downstream states, and (2) that a preexisting violation of water quality standards on any downstream segment does not automatically preclude the issuance of a new permit.

Respectfully submitted,

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